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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 261

JOE BRADLEY SMITH and MYRON PARKER, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 291 F. 2d 220.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1961. A petition for a rehearing was denied on June 30, 1961. The petition for a writ of certiorari was filed on July 26, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were properly convicted of larceny of the property of a bank, although bank officials knew of the planned theft and permitted it to proceed to a point where one of the petitioners could be caught in the act of taking the bank's money.

STATUTE INVOLVED

Section 2113(b) of Title 18 of the United States Code provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years or both; * * *

STATEMENT

After a trial by jury in the United States District Court for the District of Nevada, petitioner Smith was convicted of taking and carrying away, with intent to steal or purloin, money belonging to a national bank of a value exceeding one hundred dollars, in violation of 18 U.S.C. 2113(b), *supra*. Petitioner Parker was convicted of aiding and abetting the commission of the offense. They were sentenced to imprisonment for five years and three years, respectively. The court of appeals affirmed. The evidence may be summarized as follows:

On the morning of March 31, 1958, Richard Gianotti, a teller at the Bank of Nevada at Las Vegas, was stopped on his way to work by petitioner Parker, a friend of his. After some casual conversation, Parker

asked Gianotti what the chances were for robbing his window at the bank. The reply was that the chances would be pretty good. Answering Parker's inquiry, Gianotti said that he would have between $80,000 and $90,000 at his window. Parker said that another man, whom he did not then identify, would come to the bank, and suggested that the three meet at noon to discuss the matter (Tr. 16-18, 34).

Gianotti reported this conversation to the branch manager as soon as he arrived at the bank and was told to go on about his duties (Tr. 19, 80). The manager notified the local office of the F. B. I., which in turn informed local officers. Arrangements were made for surveillance of the proposed noon meeting and for officers to be at the bank at the time of the anticipated robbery (Tr. 81, 85-87, 145).

Following the manager's instructions to cooperate Gianotti met with petitioners at noon. Petitioner Smith said that he would be the one to come to the bank. Gianotti suggested that he bring a sack, get an exchange order, and Gianotti would put the money in the sack. Smith rejected this plan. He said he would come in and ask for change for a $100 bill, and Gianotti should have the money ready and give it to him. Parker said he would call Gianotti before Smith came to the bank (Tr. 19-23).

In accordance with the manager's instructions, Gianotti got in touch with the F. B. I. and was told to "go along" with petitioners (Tr. 53-55). A little before two o'clock, Parker called Gianotti and said that Smith would be at the bank in about fifteen minutes (Tr. 23, 49-50). Gianotti put $65,000 in a large money bag and locked it in the inner vault (Tr. 24, 51). Smith then arrived and presented to Gianotti a

$100 bill for change. Gianotti told him to wait while he got the package, then stepped back to the vault, let it be known that this was the man, returned with the money bag, and put it on the counter in front of Smith. Smith placed his hands on the bag and moved it a short distance. Two officers then stepped forward and arrested him (Tr. 24-26, 56-65, 128-130, 136-139, 142-143). Immediately afterward, Parker, who was waiting outside in a parked car, was arrested (Tr. 159-160).

ARGUMENT

Petitioners contend that the crime defined by Section 2113(b) of Title 18, *supra*, p. 2, is limited to acts which would amount to common law larceny of the property of a federally-insured bank and argue that there was no common law larceny since the "consent" of the bank officials precluded the element of trespass. The court of appeals found it unnecessary to decide whether the statute covers acts which would not amount to larceny at common law for it found that the taking here did constitute common law larceny. In our view, this case presents no problem of determining whether the statute goes beyond the common law. The section requires that there be a taking and carrying away, and the critical question, both under the statute and at common law, is whether the acts of the bank officials amounted to such consent that as a matter of law there could be no *felonious taking* of the bank's property.

The court of appeals properly ruled that the bank officials did not consent to the taking. The officials merely instructed Gianotti to "go along" with petitioners' scheme so that intent to steal could be established by petitioners' own acts. The petitioners not only

originated the criminal design but planned the details of its execution; the bank played no part in the plan. The facts of this case are substantially similar to those in the leading English case of *Reg.* v. *Williams*, 1 Carr. & K. 195 (1843), where a publican directed his servant, who had been approached by the defendant, to get in touch with the defendant and to leave marked money on the counter where the defendant could apprehend it. It was held that the defendant's taking of the money amounted to larceny. As was said in *People* v. *Hanselman*, 76 Cal. 460; 462-463, there is no such consent by the owner as will bar prosecution for larceny "where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner."

Since there were no facts shown at the trial which could amount to consent on the part of the bank, there was no need to give the defendants' requested instructions on that issue. See *Bird* v. *United States*, 187 U.S. 118, 132; *Samish* v. *United States*, 223 F. 2d 358 (C.A. 9), certiorari denied, 350 U.S. 848. Moreover, the proffered instructions (Pet. App. ix-xii), insofar as they were refused by the judge, misstated the law relating to consent—going far beyond the proper boundaries of that doctrine.

There was no improper action, either by the bank officials or the law enforcement agencies, in permitting

the scheme which originated in the minds of the defendants to proceed to the point at which the criminals could be apprehended and convicted. Cf. *Sorrells* v. *United States*, 287 U.S. 435; *Masciale* v. *United States*, 356 U.S. 386. The trial court gave proper instructions on entrapment (Tr. 275).

CONCLUSION

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

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